

120 FERC ¶ 61,284
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

KGen Hinds LLC	Docket Nos. ER05-1358-001
KGen Hot Spring LLC	ER05-1394-001
Hot Spring Power Company, LP	ER05-1419-001
Cottonwood Energy Company, LP	ER05-483-004
Union Power Partners, L.P.	ER05-977-004

ORDER AFFIRMING INITIAL DECISION

(Issued September 27, 2007)

1. This case is before the Commission on exceptions to the Partial Initial Decision¹ issued in this proceeding. In the Initial Decision, the Presiding Judge held that the Independent Generators² do not have an independent contractual right under their Interconnection Agreements (IAs) with Entergy Services, Inc. (Entergy)³ to compensation for Reactive Supply and Voltage Control from Generation Sources Service (reactive power) within the established power factor range (dead band). For the reasons discussed below, we deny the exceptions and affirm the Initial Decision.

¹ *Entergy Services, Inc.*, 117 FERC ¶ 63,004 (2006) (Initial Decision).

² The Independent Generators are: KGen Hinds, LLC (Hinds), KGen Hot Spring LLC (Hot Spring), Hot Spring Power Company, LP (Hot Spring Power), Cottonwood Energy Company LP (Cottonwood), and Union Power Partners, LP (Union Power).

³ Entergy Services, Inc. and its affiliated Operating Companies (collectively, Entergy).

I. Background

2. The Initial Decision contains a detailed account of the background and procedural history of this proceeding.⁴

3. Briefly, each of the Independent Generators separately filed a rate schedule specifying its cost-based revenue requirement for reactive power service. In their filings, each of the Independent Generators argued that they had a right to compensation under the principle of comparability set forth in Order No. 2003-A.⁵

4. After the Commission accepted Cottonwood's and Union Power's rate schedules for filing, suspended them for a nominal period, made them effective subject to refund, and ordered hearing and settlement judge procedures,⁶ Entergy filed a petition for declaratory order confirming that, if Entergy did not compensate its own or affiliated generators for reactive power within the dead band, then Entergy need not on a prospective basis compensate non-affiliated generators for reactive power within the dead band. In a concurrent filing, Entergy proposed to modify Schedule 2 of its Open Access Transmission Tariff (OATT) to set to zero the charge levied by Entergy for reactive power within the dead band from its own generators.⁷

⁴ Initial Decision, 117 FERC ¶ 63,004 at P 2-42.

⁵ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs., ¶ 31,146, at P 21 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs., ¶ 31,160, at P 416 (2004) (Order No. 2003-A), *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004) (Order No. 2003-B), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005) (Order No. 2003-C), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

⁶ *See Cottonwood Energy Co. LP*, 110 FERC ¶ 61,303 (2005), *clarified*, 112 FERC ¶ 61,317 (2005); *Union Power Partners, L.P.*, 112 FERC ¶ 61,065 (2005), *order on reh'g*, 113 FERC ¶ 61,272 (2005).

⁷ Entergy also proposed to pass through to transmission customers the costs that third-party generators were then charging Entergy for reactive power pursuant to rate schedules already accepted for filing by the Commission.

5. The Commission granted Entergy's petition for declaratory order and accepted the proposed revisions to Entergy's Schedule 2, effective November 1, 2005.⁸ Subsequently, Entergy filed complaints under section 206 of the Federal Power Act (FPA)⁹ alleging that Cottonwood's and Union Power's rate schedules were unjust and unreasonable after November 1, 2005. With respect to the rate schedules filed by KGen Hinds, KGen Hot Spring, and Hot Spring, the Commission issued orders that accepted the rate schedules, suspended them for a nominal period, made them effective subject to refund, ordered hearing and settlement judge procedures, and specified that, because the Commission accepted Entergy's proposed tariff revisions in the October 14, 2005 Order, the charges in the rate schedules would become unjust and unreasonable effective November 1, 2005.¹⁰

6. Subsequently, in five companion orders,¹¹ the Commission held that the Independent Generators could raise in their separate proceedings their claims that they have independent contractual rights under section 4.7.1 of their IAs to compensation for reactive power within the dead band. Because of the common issue in the proceedings, the Independent Generators and Entergy agreed to consolidate the cases. As relevant here, section 4.7.1 states:

At such time as FERC . . . accepts a tariff, rate schedule, or market mechanism for reactive power services or otherwise permits Customer to charge [Entergy] and/or other users for reactive power services provided by Customer, or in the event of any other change in law or regulation that permits Customer to assess market-based charges or otherwise seek reimbursement for its provision of reactive power services, Customer shall

⁸ *Entergy Services, Inc.*, 113 FERC ¶ 61,040 (2005), *order on reh'g*, 114 FERC ¶ 61,303, *order on reh'g*, 115 FERC ¶ 61,378 (2006) (October 14, 2005 Order).

⁹ 16 U.S.C. § 824e (2000).

¹⁰ See *KGen Hinds LLC*, 113 FERC ¶ 61,041, at P 14 (2005); *KGen Hot Spring LLC*, 113 FERC ¶ 61,071, at P 14 (2005); *Hot Spring Power Co., LP*, 113 FERC ¶ 61,088, at P 14 (2005). Accordingly, in each case the Commission stated that the hearing would only cover the period from the particular generator's rate effective date through October 31, 2005.

¹¹ *KGen Hinds LLC*, 115 FERC ¶ 61,028 (2006); *KGen Hot Spring LLC*, 115 FERC ¶ 61,029 (2006); *Hot Spring Power Co., LP*, 115 FERC ¶ 61,027 (2006); *Entergy Services, Inc. v. Cottonwood Energy Co. LP*, 115 FERC ¶ 61,031 (2006); *Entergy Services, Inc. v. Union Power Partners, L.P.*, 115 FERC ¶ 61,030 (2006) (April 10, 2006 Orders).

be entitled to compensation for reactive power services . . . in accordance with the terms and conditions of such tariff, rate schedule, market mechanism, or other legal or regulatory scheme. In such event, the compensation provisions of this [s]ection 4.7.1 shall no longer apply to the Parties.¹²

II. Discussion

A. Initial Decision

7. In the Initial Decision, the Presiding Judge made three findings concerning section 4.7.1. First, the Presiding Judge held that section 4.7.1 grants the Independent Generators the right to *seek* compensation for reactive power within the dead band.¹³ Second, the Presiding Judge concluded that section 4.7.1 makes payment of such compensation ultimately contingent on the Commission approving the rate, therefore making Commission approval of a submitted rate schedule both a contractual, as well as statutory, prerequisite to compensation.¹⁴ Third, the Presiding Judge held that section 4.7.1 does not contain any language creating an independent contractual right to such compensation, or limiting Entergy's right to contest a filing seeking such compensation on the basis of Commission policy or precedent.¹⁵

8. Because the Presiding Judge concluded that the Independent Generators did not have an independent contractual right to compensation for reactive power within the dead band, the Presiding Judge stated that "substantive resolution of the issue of the Independent Generators' entitlement to compensation must be determined based on established Commission precedent."¹⁶ The Presiding Judge determined that Commission policy and precedent precludes compensation for reactive power within the dead band

¹² Section 4.7.1 is the same in four of the five IAs. Union Power's IA contains a version of section 4.7.1 that is slightly different. All of the parties agree, however, that the differences are not material for purposes of ascertaining whether the Independent Generators have a contractual right to compensation for reactive power within the dead band. *See* Initial Decision, at 117 FERC ¶ 63,004 at P 47. The version of section 4.7.1 reproduced in this order is the version that appears in four of the five IAs.

¹³ Initial Decision, 117 FERC ¶ 63,004 at P 49-51, 53, 59.

¹⁴ *Id.* 51-52.

¹⁵ *Id.* P 53, 59.

¹⁶ *Id.* P 55, 59.

absent a specific contractual right or claim based on comparability.¹⁷ Having first determined that the Independent Generators did not have an independent contractual right to compensation, the Presiding Judge also observed that the Independent Generators did not dispute that as a result of the Commission's October 14, 2005 Order they no longer have a right to such compensation based on comparability.¹⁸ Accordingly, the Presiding Judge denied the Independent Generators compensation for reactive power within the dead band.

B. Brief on Exceptions

9. In their Brief on Exceptions, the Independent Generators claim that the Presiding Judge failed to determine whether they have a contractual right to compensation for reactive power within the dead band. The Independent Generators contend that although this was the sole issue before the Presiding Judge, the Presiding Judge erroneously approached the question as a matter of statute—or more precisely, Commission policy and precedent—deciding it based on the Commission's comparability standard instead of the meaning of section 4.7.1.¹⁹ As a consequence, the Independent Generators claim that the Presiding Judge effectively reversed the Commission's April 10, 2006 Orders permitting them to pursue their contract claims.

10. The Independent Generators further argue that section 4.7.1 must mean that the Independent Generators are entitled to receive compensation for reactive power within the dead band at a level authorized by the Commission. The Independent Generators contend that section 4.7.1 would be meaningless if it merely created a contractual right to seek, but not obtain, such compensation because it would then add nothing to their rights under section 205 of the FPA.²⁰ The Independent Generators also point to the canon that ambiguous contracts should be construed against the drafter, and argue that because Entergy drafted section 4.7.1, any ambiguity as to its meaning should be resolved against Entergy.²¹ Moreover, the Independent Generators state that section 4.7.1 was taken directly from the *pro forma* IA attached to Entergy's OATT, and that when Entergy originally proposed this language, Entergy stated that it allowed generators to take advantage of any Commission-approved mechanism to receive compensation for reactive

¹⁷ *Id.* P 54-58.

¹⁸ *Id.* P 58-60.

¹⁹ Independent Generators' Brief on Exceptions at 10.

²⁰ *Id.* at 13.

²¹ *Id.* at 14.

power.²² The Independent Generators argue that Entergy cannot credibly treat this language as “empty verbiage” now after having previously described it as granting generators meaningful rights.²³

11. Lastly, the Independent Generators assert that even if it was appropriate to analyze the Independent Generators’ contractual rights as a matter of Commission policy and precedent, the Presiding Judge relied on the wrong precedent. The Independent Generators state that there are two distinct lines of precedent that bear on their right to compensation for reactive power within the dead band—the first based on the comparability standard and the second based on contractual rights. The Independent Generators argue that this case falls under the second line of precedent, and that the Presiding Judge erred and relied on cases falling under the comparability standard. The Independent Generators maintain that the Presiding Judge should have read section 4.7.1 as empowering the Independent Generators to get compensation for reactive power within the dead band by filing a rate schedule with the Commission. The Independent Generators also state that other generators, including Bluegrass Generation Company, L.L.C. (Bluegrass), have received reactive power compensation under similar language.²⁴

C. Brief Opposing Exceptions

12. In its Brief Opposing Exceptions, Entergy challenges the Independent Generators’ claim that the Presiding Judge failed to decide this case based on the language of section 4.7.1. Entergy contends that the Presiding Judge analyzed section 4.7.1 and specifically held that it does not contractually entitle the Independent Generators to compensation for reactive power within the dead band.²⁵ Moreover, Entergy argues that the Independent Generators’ contrary assertion is based on an “inappropriate and abbreviated”

²² *Id.* at 15.

²³ *Id.*

²⁴ At the time the Independent Generators submitted their Brief on Exceptions, the issue of whether Bluegrass had a right to compensation for reactive power within the dead band under its IA with Louisville Gas and Electric Company and Kentucky Utilities Company (collectively, LG&E) was before the Commission in Docket No. ER07-771-000. The Commission subsequently decided the issue in *Bluegrass Generation Co. L.L.C.*, 119 FERC ¶ 61,340, at P 18-19 (2007) (*Bluegrass*).

²⁵ Entergy’s Brief Opposing Exceptions at 4-6.

paraphrasing of the Initial Decision,²⁶ and that when the relevant portion of the Initial Decision is read in its entirety, it is clear that the Presiding Judge explicitly examined and based her decision on the language of section 4.7.1.

13. Entergy argues that the Independent Generators have failed to present any analysis supporting their interpretation of section 4.7.1. In Entergy's view, the Independent Generators have merely presented "an unpersuasive and unsupported claim for an independent contractual right, simply by asserting that such a right exists."²⁷ Entergy asserts that the Independent Generators' focus on other cases and canons of construction are attempts to mislead the Commission by focusing attention away from the plain language of section 4.7.1.²⁸

14. Entergy defends the Presiding Judge's references to the comparability standard as an adept summary of the proper framework for analyzing whether the Independent Generators are entitled to compensation for reactive power within the dead band after November 1, 2005. Entergy explains that after the Presiding Judge examined section 4.7.1, and correctly held that it does not entitle the Independent Generators to such compensation, she "properly proceeded to the next step, which consisted of a review of Commission policy and precedent."²⁹ Entergy states that this review focused on the Commission's application of the comparability standard, and resulted with the Presiding Judge finding that, given the facts here, the Independent Generators do not have a right to compensation based on comparability.

15. Entergy contends that the Presiding Judge relied on appropriate Commission precedent in deciding this case. Entergy notes that the line of cases that the Independent Generators refer to as establishing the proposition that generators may have a contractual right to compensation for reactive power within the dead band consists entirely of cases in this proceeding, which has not yet culminated in a final order. Additionally, Entergy argues that the Independent Generators' reliance on cases where other generators have received reactive power compensation under IAs with language similar to section 4.7.1 is misguided because those compensation provisions were not comparable to the IAs here. Accordingly, Entergy requests that the Commission affirm the Presiding Judge.

²⁶ *Id.* at 6.

²⁷ *Id.* at 5.

²⁸ Entergy argues that the statement about its *pro forma* IA was made in an unrelated case to a party not participating in the instant proceeding, and that neither the Presiding Judge nor the parties considered section 4.7.1 to be ambiguous.

²⁹ *Id.* at 7.

III. Commission Determination

16. We deny the Independent Generators' exceptions and affirm the Presiding Judge. At the outset, we reject the Independent Generators' claim that the Presiding Judge analyzed section 4.7.1 only as a matter of Commission policy and precedent, and that she failed to determine whether the Independent Generators have an independent contractual right to compensation for reactive power within the dead band. We further reject the Independent Generators' claim that the Presiding Judge relied on the wrong line of Commission precedent in holding that the Independent Generators have no independent contractual right to such compensation. Moreover, we agree with Entergy that these claims are based on an abbreviated and misleading paraphrasing of the Initial Decision. Finally, we affirm the Presiding Judge's conclusion that section 4.7.1 does not entitle the Independent Generators to the compensation they claim.

17. In the Initial Decision, the Presiding Judge recognized that generators should not receive compensation for reactive power within the dead band unless they have a contractual right to such compensation, or are entitled to such compensation as a matter of comparability. Accordingly, the Presiding Judge organized her analysis into two parts—an analysis of the language of section 4.7.1 and a general analysis of the Commission's precedent. In asserting that the Presiding Judge failed to approach the issue in this case as a matter of contract interpretation, the Independent Generators have ignored the Presiding Judge's discussion of section 4.7.1, and focused exclusively on the Presiding Judge's discussion of the Commission's precedent.

18. The Presiding Judge expressly acknowledged that “the sole issue” in this case is whether the Independent Generators have an independent contractual right to compensation for reactive power within the dead band.³⁰ Accordingly, and contrary to the Independent Generators' claim, the Presiding Judge examined the language of section 4.7.1 and arrived at three conclusions about its meaning. First, the Presiding Judge held that section 4.7.1 grants the Independent Generators the right to *seek* compensation for reactive power within the dead band. Second, the Presiding Judge concluded that section 4.7.1, like the FPA, makes payment of such compensation ultimately contingent on the Commission approving the rate. Third, and most importantly, the Presiding Judge held that “neither [s]ection 4.7.1 nor any other contract language that the Independent Generators can point to . . . provide for an independent right to obtain compensation [for reactive power within the dead band].”³¹ Given this evidence that the Presiding Judge examined the language of section 4.7.1, we reject the Independent Generators' contrary assertion.

³⁰ Initial Decision, 117 FERC ¶ 63,004 at P 43; *accord Id.* P 46 *et seq.*

³¹ *Id.* P 53; *accord Id.* P 59.

19. The Presiding Judge noted that section 4.7.1 places no limits on Entergy's right to challenge the proposed rate schedules after they have been submitted to the Commission. In this regard, the Presiding Judge was not, as the Independent Generators suggest, forgoing an analysis of the language of section 4.7.1 for an analysis based on the FPA or Commission policy. Instead, the Presiding Judge was merely pointing out that section 4.7.1, like the FPA, does not entitle the Independent Generators to compensation upon the simple act of filing their proposed rate schedules³² (and that when such rate schedules are before the Commission, Entergy is free to contest them).

20. Similarly, the Independent Generators have mischaracterized the Presiding Judge's discussion of the Commission's precedent. Contrary to the Independent Generators' claim, the Presiding Judge did not rely on Commission precedent in lieu of examining the language of section 4.7.1. The Presiding Judge examined Commission precedent as the second part of her analysis, referring to it only after concluding that section 4.7.1 did not create an independent contractual right to compensation, and consulting it only for the purpose of determining whether it afforded the Independent Generators an alternative basis for compensation. It is inaccurate and distorts the Presiding Judge's decision to claim that she took this step in order to inform or support her decision about the meaning of section 4.7.1. The Presiding Judge correctly identified the issue in this case as an issue of contract interpretation, appropriately analyzed the language of section 4.7.1, and then examined the Commission's precedent only as part of an inquiry into a different, albeit related, question.

21. Thus, the Independent Generators' claim that the Presiding Judge relied on the wrong line of Commission precedent in analyzing section 4.7.1 is not persuasive. There is likewise no basis for the Independent Generators' argument that the appropriate precedent to rely on here is precedent establishing that a generator may have a contractual right to compensation for reactive power within the dead band. Indeed, we note that in urging the Commission to consider this precedent, the Independent Generators are advocating a proposition that neither Entergy nor the Presiding Judge has questioned. Far from rejecting the possibility that generators may have contractual rights to such compensation, the Presiding Judge expressly recognized that there can be a contractual right to such compensation as an exception to the general rule that generators should not be compensated for reactive power within the dead band.³³ What has been questioned, and what is thus at issue in this case, is whether section 4.7.1, in particular, creates such a contractual right. In fact, the Presiding Judge has found that it does not. We reaffirm that generators may have an independent contractual right to compensation for reactive power

³² *Id.* P 53, 59.

³³ *Id.* P 58.

within the dead band, regardless of whether the transmission provider's own generators are similarly compensated, but we agree with the Presiding Judge that section 4.7.1 does not create such a contractual right here.

22. We find that the Presiding Judge's interpretation of this ambiguous section, section 4.7.1, was a reasonable one. Entergy has conceded, and the Presiding Judge has found, that section 4.7.1 provides the Independent Generators with an independent contractual right to *seek* compensation for reactive power within the dead band.³⁴ Section 4.7.1 also states, however, that the Independent Generators' ability to obtain such compensation is contingent on the Commission approving such compensation. Additionally, as the Presiding Judge found, nothing in section 4.7.1 prohibits Entergy from challenging proposed rate schedules as contrary to Commission policy or precedent. In view of this contractual structure, the Presiding Judge reasonably concluded that the parties intended to distinguish between a straightforward right to *file* a rate schedule seeking compensation for reactive power within the dead band, which the Independent Generators could do unilaterally, and a contractual right to receive compensation.³⁵ Accordingly, we agree with the Presiding Judge, and do not interpret section 4.7.1 as providing an independent contractual right to compensation for reactive power within the dead band.

23. The Independent Generators assert that interpreting section 4.7.1 to provide only an independent right to file a rate schedule renders it meaningless because it adds nothing to their statutory rights. We disagree that such an interpretation is meaningless. Having an independent contractual right to file a rate schedule protects the Independent Generators from the claim that each time they seek new or different compensation they are impermissibly attempting to unilaterally alter their IAs.³⁶ Thus, a contractually protected, unilateral right to file is itself a valuable and important right.

24. Moreover, we note that we have previously recognized that language like section 4.7.1 provides that generators may file rate schedules with the Commission, but does not create an independent contractual right to compensation. In *Bluegrass*, the Commission examined compensation language similar to section 4.7.1, and held that, while it created a

³⁴ *Id.* P 49-50.

³⁵ *Cf. Central Hudson Gas & Electric Corp.*, 103 FERC ¶ 61,143, at P 9 (2003).

³⁶ *See, e.g., Bluegrass Generation Co. L.L.C.*, 118 FERC ¶ 61,214 at P 44 (2007) (rejecting LG&E's claim that Bluegrass failed to preserve a unilateral filing right in the Bluegrass-LG&E IA).

right to file seeking compensation for reactive power within the dead band, it did not create a right to the compensation itself.³⁷ That language, contained in the Bluegrass-LG&E IA, stated in relevant part:

In the event that FERC, or any other applicable Governmental Authority, issues an order or approves a tariff establishing specific compensation to be paid to [Bluegrass] for reactive power support service, [LG&E] shall pay [Bluegrass] pursuant to such order or tariff.

25. In examining the language in the Bluegrass-LG&E IA, the Commission noted that it did not entitle Bluegrass to a particular level of compensation for reactive power within the dead band, but simply provided that if the Commission issued an order or approved a tariff establishing such compensation, LG&E would be obligated to pay Bluegrass according to that order or tariff.³⁸ The Commission further noted that rate schedules filed under this language were subject to review under the Commission's reactive power compensation policy, and that therefore Bluegrass was not necessarily entitled to compensation for reactive power within the dead band.³⁹ Rather, the Commission stated that, under its policy, non-affiliated generators need not be compensated for reactive power within the dead band unless a transmission provider's own generators are so compensated.⁴⁰

26. Here, section 4.7.1 contains language similar to the Bluegrass-LG&E IA. Specifically, it states that:

At such time as FERC . . . accepts a tariff, rate schedule, or market mechanism for reactive power services or otherwise permits Customer to charge [Entergy] and/or other users for reactive power services provided by Customer, or in the event of any other change in law or regulation that permits Customer to assess market-based charges or otherwise seek reimbursement for its provision of reactive power services, Customer shall be entitled to compensation for reactive power services . . . in accordance with the terms and conditions of such tariff, rate schedule, market mechanism, or other legal or regulatory scheme.

³⁷ *Bluegrass*, 119 FERC ¶ 61,340 at P 18.

³⁸ *Id.* P 19.

³⁹ *Id.*

⁴⁰ *Id.* P 19.

The Presiding Judge examined this language and concluded that, while it grants the Independent Generators the right to *seek* compensation for reactive power within the dead band, it does not contain any language either creating a contractual right to receive such compensation or limiting Entergy's right to contest a filing seeking such compensation.

27. We therefore affirm the Presiding Judge and deny the Independent Generators' exceptions. Like the IA in *Bluegrass*, section 4.7.1 neither establishes a specific level of contractual compensation for reactive power within the dead band, nor goes beyond merely providing that the Independent Generators will receive such compensation if the Commission approves a tariff or rate schedule allowing it. As the Presiding Judge held, there is no language in section 4.7.1 creating an entitlement to such compensation. Accordingly, and consistent with our interpretation of similar language in *Bluegrass*, we find that section 4.7.1 does not grant the Independent Generators an independent contractual right to compensation for reactive power within the dead band, and as such, deny their exceptions and affirm the Presiding Judge.

The Commission orders:

The Initial Decision is hereby affirmed, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.